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ENRIQUE RIVERA, :
 :
 Plaintiff, : 13 Civ. 7150 (PGG) (HBP)
 :
 -against- : REPORT AND
 : RECOMMENDATION
 :
 CAROLYN W. COLVIN, acting :
 Commissioner of Social Security, :
 :
 Defendant. :
 :
 -----X

PITMAN, United States Magistrate Judge:

TO THE HONORABLE PAUL G. GARDEPHE, United States

District Judge,

I. Introduction

Plaintiff, Enrique Rivera, brings this action pursuant to Section 205(g) of the Social Security Act (the "Act"), 42 U.S.C. § 405(g), seeking judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying his application for supplemental security income benefits ("SSI"). Plaintiff has moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure (Notice of Motion, dated April 25, 2014 (Docket Item 10)). The Commissioner has filed a cross-motion also seeking judgment on the pleadings

(Notice of Motion, dated June 27, 2014 (Docket Item 14)).

For the reasons set forth below, I respectfully recommend that plaintiff's motion for judgment on the pleadings be granted to the extent of remanding this matter for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and that the Commissioner's motion for judgment on the pleadings be denied.

II. Facts

A. Procedural Background

Plaintiff filed an application for SSI on May 16, 2011,¹ alleging that he had been disabled since February 1, 2007 (Tr.² 102-10). The SSA denied plaintiff's application, finding

¹Plaintiff was given a protective filing date of April 25, 2011 (Tr. 153). A claimant is issued a protective filing date when he files a written statement with the Social Security Administration ("SSA") that indicates an intent to file a claim for benefits. 20 C.F.R. § 416.340. "If a claimant is given a protective filing date that is earlier than the application date, the availability of social security benefits is calculated from the earlier protective filing date." Elliott v. Colvin, 13 Civ. 2673 (MKB), 2014 WL 4793452 at *1 n.1 (E.D.N.Y. Sept. 24, 2014), citing Roma v. Astrue, No. 07-CV-1057, 2010 WL 3418165 at *1 n.1 (D. Conn. Mar. 12, 2010) ("[A]ny post-entitlement determinations involving the application filing date would use the protective filing date.").

²"Tr." refers to the administrative record that the Commissioner filed with her answer, pursuant to 42 U.S.C. §
(continued...)

that he was not disabled (Tr. 71). Plaintiff timely requested and was granted a hearing before an Administrative Law Judge ("ALJ") (see Tr. 64). ALJ Michael Stacchini conducted a hearing on June 19, 2012 (Tr. 28-52). In a decision dated July 24, 2012, ALJ Stacchini determined that plaintiff was not disabled within the meaning of the Act (Tr. 16-23). The ALJ's decision became the final decision of the Commissioner on August 14, 2013 when the Appeals Council denied plaintiff's request for review (Tr. 1-4).

Plaintiff commenced this action seeking review of the Commissioner's decision on October 9, 2013 (Complaint (Docket Item 2)). On April 25, 2014, plaintiff moved for judgment on the pleadings (Docket Item 10), and on June 27, 2014 the Commissioner cross-moved for judgment on the pleadings (Docket Item 14).

B. Plaintiff's
Social Background

Plaintiff was born December 6, 1964 and was forty-six years old when he applied for SSI (see Tr. 153). He holds a General Education Diploma and speaks English (Tr. 156, 158). At the time of the hearing, plaintiff lived at a residential facil-

²(...continued)
405(g) (see Notice of Filing of Administrative Record, dated December 5, 2013 (Docket Item 8)).

ity, Starhill/Palladia,³ as mandated by the Brooklyn Mental Health Court,⁴ where he received mental health treatment (Tr. 36-37, 187). At that time, plaintiff had lived in the facility for approximately thirty months (Tr. 38). Plaintiff had not had full time employment since 2006 (Tr. 39), although he did some part time work as a janitor for FECS⁵ about a year before the hearing (Tr. 38).

³Starhill/Palladia is a residential drug treatment facility. "Starhill's multidisciplinary staff also assists clients in developing solutions to challenges beyond substance abuse -- such as co-occurring disorders, pregnancy, legal and/or medical issues, and vocational direction and skills." Starhill|Palladia, Starhill, <http://www.palladiainc.org/our-services/behavioral-health/starhill/> (last visited Dec. 8, 2014).

⁴The Brooklyn Mental Health Court "is a specialized court part that seeks to craft a meaningful response to the problems posed by defendants with mental illness in the criminal justice system." Center for Court Innovation, Brooklyn Mental Health Court, <http://www.courtinnovation.org/project/brooklyn-mental-health-court> (last visited Dec. 8, 2014).

⁵Federal Employment and Guidance Service ("FECS") WeCare is a New York City program that "helps [public] assistance applicants and recipients with complex clinical barriers to employment, including medical, mental health, and substance abuse conditions, to obtain employment or federal disability benefits." FECS: WeCare, FECS Health & Human Servs., <http://www.fecs.org/what-we-do/employment-workforce/jobseekers/wecare> (last visited Oct. 29, 2014).

1. Function Reports
Completed by Ms. Gonzalez

Waleska Gonzalez, a friend of plaintiff's mother, completed a Function Report for plaintiff on May 31, 2011 (Tr. 164-86). In that report, Ms. Gonzalez wrote that plaintiff stated that without medication he would become violent and would not dress, bathe, shave or eat (Tr. 166-67). Ms. Gonzalez wrote that staff from plaintiff's living facility reminded him to perform all his daily activities (Tr. 167), and that while he did some chores, he did them under the supervision of the facility's staff (Tr. 166). She also wrote that plaintiff stated that he did not do house or yard work because "when something d[id]n't come out right [he would] get upset and break stuff" (Tr. 168).

Ms. Gonzalez also completed a Function Report on May 31, 2011 based on information from plaintiff's mother, who does not speak English and requested Ms. Gonzalez's assistance in completing the form (Tr. 186). Ms. Gonzalez again wrote that plaintiff did chores under the supervision of people from the home (Tr. 178), and that the staff at the home had to remind plaintiff to bathe and shave (Tr. 179). Ms. Gonzalez reported that plaintiff required supervision to go out to attend his outpatient appointments, and that he could not go out alone because he would get confused and forget where he was (Tr. 181).

She also reported that plaintiff would get angry easily and had trouble getting along with people (Tr. 183).

2. Function Report
Completed by Plaintiff's
Mental Health Counselor

Plaintiff's mental health counselor completed a Function Report on June 15, 2011 (Tr. 187-99). In the report, the counselor stated that plaintiff attended six group therapy sessions daily (Tr. 188). He wrote that plaintiff helped clean the kitchen (Tr. 190) but did not prepare his own meals (Tr. 189). The counselor wrote that plaintiff was capable of taking public transportation but did not like to be "closed in" and usually walked instead (Tr. 190). The counselor reported that plaintiff shopped for clothes for two hours every six months but did no other shopping (Tr. 191). He reported that plaintiff's hobbies included reading and painting (Tr. 191), and that plaintiff walked for one hour each day (Tr. 192).

The counselor also wrote that plaintiff was not able to sleep without medication, and that even with medication plaintiff had difficulties (Tr. 188). The counselor wrote that plaintiff had memory issues and had to be reminded to take his medication (Tr. 189), and though he was able to follow instructions, he needed the instructions to be written down because he was unable

to remember them (Tr. 195). The counselor reported that plaintiff did not socialize (Tr. 192) and had anger and anxiety issues (Tr. 195). These anxiety issues included weekly anxiety attacks during which plaintiff experienced fear, chest pain and difficulty breathing; plaintiff coped with these episodes by taking long walks away from people (Tr. 195).

C. Plaintiff's
Medical Background⁶

Plaintiff has a history of suicide attempts and one homicide attempt (Tr. 239, 248). Plaintiff received psychiatric treatment in 1988 (Tr. 230-37) and went to the Emergency Room in 2004 after attempting suicide (Tr. 238-43). Plaintiff also underwent psychiatric treatment in 2010, 2011 and 2012.

1. Treating Sources

a. Nurse Practitioners

Plaintiff was seen consistently by nurse practitioners ("NP") starting in 2010, and treatment notes from those nurses indicate that plaintiff suffered from various symptoms of depres-

⁶I recite only those facts relevant to my review. The administrative record more fully sets out plaintiff's medical history (Docket Item 11).

sion and anxiety. In March 2010, plaintiff was described as "present[ing] as though [he] has given up" (Tr. 292-93), and in April 2010, he expressed concern that he would react violently to the staff at his group home (Tr. 294). In May 2010, plaintiff had a "flat, angry affect, no eye contact, [and was] monosyllabic" (Tr. 295). In June 2010 he continued to have a flat and angry affect, "although appropriate in session," and at that time he reported that he was taking long walks as a coping mechanism (Tr. 296). His anxiety and agitation increased in July 2010 when he was no longer able to take long walks, and the nurse attempted to get his permission to exercise reinstated (Tr. 297).

In August 2010, treatment notes state that plaintiff was agitated and could not sit still (Tr. 298-99). In September 2010 he was anxious and frustrated because he felt his job search was being held up intentionally by his vocational therapist, but he denied suicidal or homicidal ideation (Tr. 300-01). In October 2010 he was still frustrated about his delayed job search, and he reported that he was waking up twice during the night with tightness in his chest (Tr. 302-03). In November 2010, he had trouble sleeping and was agitated, and the nurse practitioner indicated that he had a "low tolerance level with small triggers" (Tr. 306-09). Plaintiff denied other depressive symptoms at that time, and later that month he reported sleeping

well and feeling good (Tr. 306-09). In December 2010, the nurse practitioner indicated that plaintiff's appointment had been scheduled because plaintiff was looking for a job, and that he was sleeping well but feeling sad (Tr. 310-11). In March 2011 he reported sleeping well and feeling good (Tr. 312-13).

A Psychiatric Questionnaire was completed by Roberta Kelly, a family nurse practitioner of Project Samaritan⁷ on June 6, 2011, and she wrote that plaintiff suffered from bipolar disorder, depression, anxiety disorder and hyperlipidemia⁸ and that these disorders were chronic and permanent (Tr. 244-47). A second Psychiatric Questionnaire, completed by nurse practitioner Jieun Jung and undated, reported that plaintiff lacked normal ability to get along with people, and that plaintiff was mildly depressed and anxious (Tr. 249-52). NP Jung wrote that plaintiff would not be able to hold a job beyond a few months because of arguments with co-workers and that he would be limited in following detailed instructions (Tr. 250-51). NP Jung wrote that

⁷Project Samaritan is "a person-centered, comprehensive, health-and-wellness organization serving approximately 13,000 New Yorkers annually with a particular focus on care for underserved populations experiencing co-occurring morbidities who face barriers to accessing primary and mental healthcare." HELP/PSI: Building Hope and Empowering Change, <http://www.projectsamaritan.org/> (last visited Dec. 8, 2014).

⁸"Hyperlipidemia" is "a general term for elevated concentrations of any or all of the lipids in the plasma." Dorland's Illustrated Medical Dictionary, at 794 (27th ed. 1998).

plaintiff's impulse control was good, his concentration was intact and that his memory was "forgettable but age appropriate" (Tr. 248, 250). She also indicated that plaintiff had no limitations with respect to the activities of daily living (Tr. 250).

Treatment notes from June 8, 2011 describe plaintiff as anxious and worried about his future, withdrawn with moderate eye contact, and report that, at that time, plaintiff was working as a janitor at FECS for five hours per day, five to six days per week, without any trouble (Tr. 256-58). Treatment notes from November 2011 indicate plaintiff was having difficulty sleeping again (Tr. 315-16). Treatment notes from January 2012 state that plaintiff was "not related well with short and simple answers," but that he was "[s]till good with his girlfriend" (Tr. 317-18).

b. Treating Physicians

Treatment notes from plaintiff's visits to Dr. Andrew Chen, dated January 20, 2010, indicate that plaintiff displayed isolated behavior, depression, sad mood and unprovoked anger (Tr. 288-89). A week later, Dr. Chen's notes reflect that plaintiff had occasional difficulty sleeping, but otherwise had no complaints (Tr. 290-91). Dr. Chen's notes from October 2010 reflect that plaintiff denied any depressive symptoms but had

trouble sleeping and was experiencing episodes of anxiety (Tr. 304-05).

Treatment notes from Dr. Andrew Rosendahl, dated March 2012, reflect that plaintiff had an irritable mood and difficulty sleeping (Tr. 319-20). The next month plaintiff was agitated (Tr. 321), and in May 2012, Dr. Rosendahl wrote that plaintiff was stable with residual irritability and erratic sleep (Tr. 322-23). He also wrote that plaintiff exhibited "sig[nificant(?)] personality pathology" and was "quite entitled [sic]" (Tr. 322-23). In June 2012, Dr. Rosendahl's list of plaintiff's diagnoses included post traumatic stress disorder, mood disorder, intermittent explosive disorder, anxiety disorder and antisocial personality disorder (Tr. 326). Dr. Rosendahl prescribed that plaintiff remain in close psychiatric observation and treatment to target depression, mood lability, impulsivity and rage episodes, and described plaintiff as stable with persistent anger and irritability (Tr. 325-27).

2. Consulting Physicians

On June 22, 2011, Dr. Edward Hoffman, an SSA consulting psychologist, examined plaintiff and completed a Psychiatric Evaluation (Tr. 259-62). Plaintiff arrived at the appointment by taking the subway by himself, and at the time, he was attending

job training through FEES (Tr. 259). Plaintiff reported that he saw a psychiatrist monthly and a therapist weekly (Tr. 259). Plaintiff's medication included Zoloft, Seroquel, Remeron, Abilify and BuSpar (Tr. 259). Plaintiff reported poor sleep, frequent nightmares, excessive appetite and depression, but he denied suicidal ideation, homicidal ideation and hallucinations (Tr. 259).

Dr. Hoffman wrote that plaintiff had a "somewhat constricted range of affect" and that his mood was anxious but stable (Tr. 260). Dr. Hoffman also found that plaintiff's attention and concentration were "not adequate, as measured by arithmetic questions and questions of general knowledge" and that plaintiff had a borderline range of intelligence with fair insight and judgment (Tr. 260). Dr. Hoffman found plaintiff's socialization skills were impaired, but that plaintiff could maintain a schedule, relate adequately to others in "structured situations," and had "adequate adaptive functioning" (Tr. 261). He wrote that plaintiff could not manage funds independently and that his prognosis was "guarded" (Tr. 262). Dr. Hoffman recommended that plaintiff obtain vocational counseling and continue to receive "intensive outpatient mental health treatment" (Tr. 261).

Dr. T. Harding, an SSA consulting psychologist, completed a Psychiatric Review Technique for plaintiff on August 3, 2011 (Tr. 263-76). His report does not appear to be based on an examination of plaintiff. Dr. Harding found that plaintiff suffered from affective disorders, organic mental disorders, anxiety related disorders and substance addiction disorders and would require a residual functional capacity ("RFC") assessment (Tr. 263).

Dr. Harding also completed a Mental Residual Functional Capacity Assessment of plaintiff (Tr. 277-80). This assessment does not appear to be based on an examination of plaintiff. Dr. Harding found that plaintiff was moderately limited in his ability to understand, remember and carry out detailed instructions and in his ability to maintain concentration for extended periods (Tr. 277). Dr. Harding also found plaintiff to be moderately limited in his ability to complete a workweek without interruptions from psychologically based symptoms, his ability to get along with co-workers, his ability to respond appropriately to supervisors and changes in the work setting and his ability to maintain socially appropriate behavior (Tr. 278). Dr. Harding found that plaintiff retained the RFC for unskilled work in a setting that does not emphasize social interaction (Tr. 279).

D. Proceedings
Before the ALJ

1. Plaintiff's
Testimony

Plaintiff testified that he arrived at the hearing by taking the subway at 5:00 A.M. because it is empty at that time (Tr. 34). He testified that he often went walking, but that his walking was limited at that time because he had injured his foot and required the assistance of a cane (Tr. 34). He testified that he walked by himself from one side of the Bronx to the other (Tr. 35).

Plaintiff testified that he resided in a court-mandated substance abuse and mental health treatment facility (Tr. 36-37). He testified that at this facility, his meals were prepared for him (Tr. 36), but he did his own laundry in the communal laundry area (Tr. 37). Plaintiff testified that he did not get along well with the people with whom he lived (Tr. 38), and he had been in three fights at his living facility (Tr. 46-47).

Plaintiff testified that he had worked in a janitorial capacity, through a FEES program, but that the job was "too closed in" (Tr. 39). Years earlier he had had a job working on a bridge, but the heights upset him (Tr. 39). Plaintiff testified that within the past five years he had gone to FEES to see if

they would help him find a job, but they had not been helpful (Tr. 42-43).

Plaintiff testified that he became anxious in closed spaces and that he was forgetful (Tr. 43). He testified that his hobbies included reading fantasy books (Tr. 44), and he called his mother every day (Tr. 37). Plaintiff testified that he had graduated from Brooklyn Mental Health Court (Tr. 37), and that he was looking for new housing using Google (Tr. 46).

2. Vocational
Expert Testimony

The ALJ did not question the vocational expert about plaintiff's janitorial job because he found that it was not substantial gainful activity (Tr. 49). In his first question to the vocational expert, the ALJ described a hypothetical individual who had no exertional limitations but did have the following restrictions: could not be exposed to heights or dangerous machinery, could only perform simple repetitive tasks, could be off-task 5% of the day outside of regularly scheduled breaks, could have one absence per month and could interact with co-workers and supervisors only occasionally (Tr. 49-50). The vocational expert testified that such an individual could perform the work of laundry bagger, cafeteria attendant or addresser (Tr.

50). In his second question to the vocational expert, the ALJ described a hypothetical individual with the same limitations as the first hypothetical individual, but with the additional limitation that he could be off-task 20% of the day and absent two days per month (Tr. 50). The vocational expert testified that such individual would not be able to perform any work that existed in the national economy (Tr. 50-51).

III. Analysis

A. Applicable Legal Principles

1. Standard of Review

The Court may set aside the final decision of the Commissioner only if it is not supported by substantial evidence or if it is based upon an erroneous legal standard. 42 U.S.C. § 405(g); Selian v. Astrue, 708 F.3d 409, 417 (2d Cir. 2013) (per curiam); Talavera v. Astrue, 697 F.3d 145, 151 (2d Cir. 2012); Burgess v. Astrue, 537 F.3d 117, 127 (2d Cir. 2008).

The Court first reviews the Commissioner's decision for compliance with the correct legal standards; only then does it determine whether the Commissioner's conclusions were supported by substantial evidence. Tejada v. Apfel, 167 F.3d 770, 773 (2d

Cir. 1999); Johnson v. Bowen, 817 F.2d 983, 985 (2d Cir. 1987). "Even if the Commissioner's decision is supported by substantial evidence, legal error alone can be enough to overturn the ALJ's decision," Ellington v. Astrue, 641 F. Supp. 2d 322, 328 (S.D.N.Y. 2009) (Marrero, D.J.); accord Johnson v. Bowen, supra, 817 F.2d at 986, but "where application of the correct legal principles to the record could lead to only one conclusion, there is no need to require agency reconsideration," Johnson v. Bowen, supra, 817 F.2d at 986.

"'Substantial evidence' is 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Talavera v. Astrue, supra, 697 F.3d at 151, quoting Richardson v. Perales, 402 U.S. 389, 401 (1971). Consequently, "[e]ven where the administrative record may also adequately support contrary findings on particular issues, the ALJ's factual findings 'must be given conclusive effect' so long as they are supported by substantial evidence." Genier v. Astrue, 606 F.3d 46, 49 (2d Cir. 2010) (per curiam), quoting Schauer v. Schweiker, 675 F.2d 55, 57 (2d Cir. 1982). Thus, "[i]n determining whether the agency's findings were supported by substantial evidence, 'the reviewing court is required to examine the entire record, including contradictory evidence and evidence from which conflicting inferences can be

drawn.'" Selian v. Astrue, supra, 708 F.3d at 417, quoting Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir. 1983) (per curiam).

2. Determination
of Disability

A claimant is entitled to SSI benefits if he can establish an inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A); see also Barnhart v. Walton, 535 U.S. 212, 217-22 (2002) (both impairment and inability to work must last twelve months).⁹ The impairment must be demonstrated by "medically acceptable clinical and laboratory diagnostic techniques," 42 U.S.C. § 1382c(a)(3)(D), and it must be "of such severity" that the claimant cannot perform his previous work and "cannot, considering [the claimant's] age, education, and work experience, engage in any other kind of substantial gainful work

⁹The standards that must be met to receive SSI benefits under Title XVI of the Act are the same as the standards that must be met in order to receive disability insurance benefits under Title II of the Act. Barnhart v. Thomas, 540 U.S. 20, 24 (2003). Accordingly, cases addressing the latter are equally applicable to cases involving the former.

which exists in the national economy." 42 U.S.C. § 1382c(a)(3)(B). Whether such work is actually available in the area where the claimant resides is immaterial. 42 U.S.C. § 1382c(a)(3)(B).

In making the disability determination, the Commissioner must consider: "(1) the objective medical facts; (2) diagnoses or medical opinions based on such facts; (3) subjective evidence of pain or disability testified to by the claimant or others; and (4) the claimant's educational background, age, and work experience." Brown v. Apfel, *supra*, 174 F.3d at 62; DiPalma v. Colvin, 951 F. Supp. 2d 555, 565 (S.D.N.Y. 2013) (Peck, M.J.).

The Commissioner must follow the five-step process required by the relevant regulations. 20 C.F.R. § 416.920(a)(4)(i)-(v). The first step is a determination of whether the claimant is engaged in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(i). If he is not, the second step requires determining whether the claimant has a "severe medically determinable physical or mental impairment." 20 C.F.R. § 416.920(a)(4)(ii). If he does, the inquiry at the third step is whether any of these impairments meet one of the listings in Appendix 1 of the regulations. 20 C.F.R. § 416.920(a)(4)(iii). If the answer to this inquiry is affirmative, the claimant is disabled. 20 C.F.R. § 416.920(a)(4)(iii).

If the claimant does not meet any of the listings in Appendix 1, step four requires an assessment of the claimant's RFC and whether the claimant can still perform his past relevant work given his RFC. 20 C.F.R. § 416.920(a)(4)(iv); see Barnhart v. Thomas, supra, 540 U.S. at 24-25. If he cannot, then the fifth step requires assessment of whether, given claimant's RFC, he can make an adjustment to other work. 20 C.F.R. § 416.920(a)(4)(v). If he cannot, he will be found disabled. 20 C.F.R. § 416.920(a)(4)(v); see Selian v. Astrue, supra, 708 F.3d at 417-18; Talavera v. Astrue, supra, 697 F.3d at 151.

RFC is defined in the applicable regulations as "the most [the claimant] can still do despite [his] limitations." 20 C.F.R. § 416.945(a)(1). To determine RFC, the ALJ "identif[ies] the individual's functional limitations or restrictions and assess[es] his or her work-related abilities on a function-by-function basis, including the functions in paragraphs (b), (c), and (d) of 20 [C.F.R. §§] 404.1545 and 416.945." Cichocki v. Astrue, 729 F.3d 172, 176 (2d Cir. 2013) (per curiam), quoting SSR 96-8p, 1996 WL 374184 at *1 (July 2, 1996). The results of this assessment determine the claimant's ability to perform the exertional demands of sustained work and may be categorized as sedentary, light, medium, heavy or very heavy. 20 C.F.R. § 416.967; see Rodriguez v. Apfel, 96 Civ. 8330 (JGK),

1998 WL 150981 at *7 n.7 (S.D.N.Y. Mar. 31, 1998) (Koeltl, D.J.). This ability may then be found to be further limited by non-exertional factors that restrict the claimant's ability to work. See Butts v. Barnhart, 388 F.3d 377, 383 (2d Cir. 2004), amended in part on other grounds on reh'g, 416 F.3d 101 (2d Cir. 2005); Bapp v. Bowen, 802 F.2d 601, 605-06 (2d Cir. 1986).

The claimant bears the initial burden of proving disability with respect to the first four steps. Selian v. Astrue, supra, 708 F.3d at 418; Burgess v. Astrue, supra, 537 F.3d at 128. Once the claimant has satisfied this burden, the burden shifts to the Commissioner to prove the final step -- that the claimant's RFC allows the claimant to perform some work other than his past work. Selian v. Astrue, supra, 708 F.3d at 418; Butts v. Barnhart, supra, 388 F.3d at 383.

In some cases, the Commissioner can rely exclusively on the Medical-Vocational Guidelines ("the Grid") contained in 20 C.F.R. Part 404, Subpart P, Appendix 2 when making the determination at the fifth step. Gray v. Chater, 903 F. Supp. 293, 297-98 (N.D.N.Y. 1995). "The Grid takes into account the claimant's RFC in conjunction with the claimant's age, education and work experience. Based on these factors, the Grid indicates whether the claimant can engage in any other substantial gainful work which exists in the national economy." Gray v. Chater, supra,

903 F. Supp. at 298; accord Butts v. Barnhart, supra, 388 F.3d at 383.

The Grid may not be relied upon exclusively in cases where the claimant has nonexertional limitations that significantly restrict his ability to work. Butts v. Barnhart, supra, 388 F.3d at 383; Bapp v. Bowen, supra, 802 F.2d at 605-06. When a claimant suffers from a nonexertional limitation such that he is "unable to perform the full range of employment indicated by the [Grid]," Bapp v. Bowen, supra, 802 F.2d at 603, or the Grid fails "to describe the full extent of a claimant's physical limitations," Butts v. Barnhart, supra, 388 F.3d at 383, the Commissioner must introduce the testimony of a vocational expert in order to prove "that jobs exist in the economy which claimant can obtain and perform." Butts v. Barnhart, supra, 388 F.3d at 384 (internal quotation marks and citation omitted); see also Heckler v. Campbell, 461 U.S. 458, 462 n.5 (1983) ("If an individual's capabilities are not described accurately by a rule, the regulations make clear that the individual's particular limitations must be considered.").

B. The ALJ's Decision

At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since April 25, 2011 (Tr. 18).

At step two, the ALJ found that plaintiff had several severe impairments, including bipolar disorder, anxiety, depression and a cognitive disorder "not otherwise specified" (Tr. 18). The ALJ found that plaintiff also had two non-severe impairments -- polysubstance abuse, which was in remission, and hyperlipidemia (Tr. 18).

At step three, the ALJ found that plaintiff did not have impairments that met or medically equaled an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Tr. 18). The ALJ found that plaintiff did not meet the Paragraph B Criteria for Mental Disorders because plaintiff had only moderate restrictions in activities of daily living, moderate difficulties in maintaining social functioning and concentration, persistence or pace, and no episodes of decompensation for an extended duration (Tr. 19). The ALJ noted that while there were one or two episodes of decompensation in plaintiff's history, his last psychiatric hospitalization occurred in 2004 (Tr. 19). The ALJ stated that plaintiff had no recent episodes of decompensation

and that plaintiff was often in public, walked when he could, had consistently tested normal for concentration and was capable of performing his own activities of daily living (Tr. 19). The ALJ found that the plaintiff did not meet the Paragraph C Criteria¹⁰ for Mental Disorders because he had no recent episodes of decompensation, had no residual disease process that would preclude increased mental demands, and he was able to function outside a highly supportive living environment (Tr. 19).

At step four, the ALJ found the plaintiff's RFC to encompass the

full range of work at all exertional levels but with the following non-exertional limitations: avoid all exposure to hazardous machinery and unprotected heights; permitted to be off tasks 5% off task [sic], in addition to regularly scheduled breaks; one excused absence per month; limited to simple, routine and repetitive tasks; occasional interaction with the general public; and occasional interaction with co-workers, including supervisors

(Tr. 19).

The ALJ found that plaintiff was "credible, but not to the extent alleged [sic]" (Tr. 21). The ALJ found that although the plaintiff claimed to experience anxiety around people, he lived in a group setting, did his laundry in a group area, went

¹⁰The Paragraph C Criteria describe functional limitations of an individual that, if present, direct a finding of disability. 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.04.

for long walks and took public transportation (Tr. 21). The ALJ also noted that the plaintiff had had romantic relationships and could perform his own activities of daily living (Tr. 21). The ALJ further noted that plaintiff stopped working because his last job was temporary, not because he had any impairments, and that in late 2010 plaintiff searched for work (Tr. 21). The ALJ stated that plaintiff's mental status examinations had "been essentially normal" for the past two years and that plaintiff had been diagnosed recently as stable and denied any mood symptoms aside from irritability (Tr. 21).

The ALJ accorded "great weight" to the opinions of the psychological consultative examiner and the opinions set forth in the Psychiatric Review Technique and Mental Residual Function Capacity Assessment "since those assessments [conclude] that the claimant can perform unskilled work [sic], despite an array of moderate mental limitations" (Tr. 21). The ALJ accorded NP Jung's opinions "little weight" because they were inconsistent with activities of daily living that plaintiff was able to perform and with the medical records, and because NP Jung is not a medically acceptable source within the meaning of 20 C.F.R. § 416.913(d) (Tr. 21).

The ALJ found that plaintiff could not perform his past relevant work as a janitor because it was "too physically and mentally demanding" (Tr. 21).¹¹

At step five, the ALJ found that there are jobs that plaintiff could perform that exist in the national economy in significant numbers (Tr. 22). The ALJ found that while plaintiff could perform work at all exertional levels, plaintiff suffered from nonexertional limitations, and, therefore, the ALJ solicited testimony from a vocational expert (Tr. 22). The vocational expert testified that an individual with plaintiff's RFC, age, education and work experience would be able to perform the work of a laundry bagger, cafeteria attendant or addresser, and the ALJ found, based on the vocational expert's testimony, that plaintiff could make a successful adjustment to other work (Tr. 22). The ALJ therefore found plaintiff not disabled under the framework of section 204.00 of the Grid (Tr. 22).¹²

¹¹It is not clear what work the ALJ is referring to here. Past relevant work must be work that was a substantial gainful activity. 20 C.F.R. § 416.960(b)(1). The ALJ stated in his decision that "[a]t no time relevant to this decision has the claimant engaged in substantial gainful activity" (Tr. 18).

¹²The ALJ does not explain this determination. Section 204.00 applies to individuals who have a "[m]aximum sustained work capability limited to heavy work." 20 C.F.R. pt. 404, Subpt. P, app. 2, § 204.00. The ALJ's use of this section conflicts with his determination that plaintiff was unable to perform his past relevant work as a janitor because that work was
(continued...)

C. Analysis of the
ALJ's Decision

Plaintiff contends that the ALJ's decision is incorrect for four reasons: (1) the ALJ's finding that plaintiff did not meet the Paragraph C Criteria was conclusory; (2) the ALJ's credibility assessment was "unfair"; (3) the ALJ evaluated medical sources improperly, and (4) the ALJ improperly relied on vocational expert testimony (Plaintiff's Memorandum of Law, dated April 25, 2014 (Docket Item 11) ("Pl.'s Mem.") at 1, 3, 6, 11).

1. Paragraph C Criteria

Plaintiff first argues that remand is required because the ALJ simply concluded that plaintiff did not meet the Paragraph C Criteria of Listing 12.04 without any assessment of the pertinent criteria (Pl.'s Mem. at 1). Specifically, plaintiff claims that the ALJ failed to make the determination required at the third criterion of Paragraph C -- whether plaintiff was able to function outside of a highly supportive environment (Pl.'s Mem. at 1-2).

¹²(...continued)
too physically and mentally demanding (see Tr. 21). His use of a Grid Rule also conflicts with his apparent reliance on vocational expert testimony (see Tr. 22).

The Paragraph C Criteria of Section 12.04 dictate a finding that a plaintiff is disabled if he can show:

C. Medically documented history of a chronic affective disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:

1. Repeated episodes of decompensation, each of extended duration; or

2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or

3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

20 C.F.R. pt. 404, subpt. P, app. 1, § 12.04.

The ALJ's of the Paragraph C Criteria was limited to a statement that: "In this case, the evidence fails to establish the presence of the 'paragraph C' criteria because there is no evidence that claimant experiences repeated episodes of decompensation, a residual disease process barring an increase in mental demands or an inability to function outside a highly supportive living environment" (Tr. 19).

"Even where the hearing officer's ultimate conclusion is potentially supportable, the Court ought not affirm a decision where there is a reasonable basis for doubting whether the

appropriate legal standards were applied." Aregano v. Astrue, 882 F. Supp. 2d 306, 320 (N.D.N.Y. 2012), citing Johnson v. Bowen, supra, 817 F.2d at 986 and Berry v. Schweiker, 675 F.2d 464, 469 (2d Cir. 1982) (In "cases in which the disability claim is premised upon one or more listed impairments of Appendix 1, the Secretary should set forth a sufficient rationale in support of his decision to find or not to find a listed impairment.").

The ALJ made no assessment with respect to the third Paragraph C criterion, i.e., whether plaintiff had a current history of one or more years' inability to function outside a highly supportive living arrangement and indicated a continued need for such an arrangement. He simply stated that the criterion was not met. The facts here are not so clear as to render the ALJ's analysis of this third criterion unnecessary. On the one hand, plaintiff had successfully graduated from Mental Health Court, was actively looking for new housing, and the ALJ identified activities that plaintiff was capable of doing on his own; however, given plaintiff's thirty months in a court-mandated residential mental health treatment facility, his report and his mother's report regarding the support provided in that facility and the physicians' recommendations of continued intensive

psychological treatment, the ALJ should have provided some analysis as to the third Paragraph C criterion.¹³

This failure warrants remand for further explanation. See Aregano v. Astrue, supra, 882 F. Supp. 2d at 320 ("The hearing officer addressed only one of [the Paragraph C] factors, and did not include any evidence or discussion of the other factors."); Bohn v. Comm'r of Soc. Sec., 7:10-CV-1078 (TJM) (DEP), 2012 WL 1048607 at *10 (N.D.N.Y. Mar. 5, 2012) (Report & Recommendation), adopted at 2012 WL 1048867 (N.D.N.Y. Mar. 28, 2012) ("[T]he ALJ offered no meaningful analysis in his decision whatsoever regarding the paragraph (C) criteria. This was error and alone requires reversal and a remand of the matter to the agency for further consideration.").

2. Credibility Assessment

Plaintiff also argues that remand is required because the ALJ improperly discounted plaintiff's credibility based on plaintiff's attendance at his hearing, his regular long walks and his ability to do laundry in a communal area (Pl.'s Mem. at 3-6).

¹³Plaintiff claims that the consulting physicians and plaintiff's treating sources state that plaintiff requires a highly supportive environment in order to function and that the ALJ failed to acknowledge this in his Paragraph C analysis (Pl.'s Mem. at 2-3). Neither the consulting physicians nor the treating sources made such statements.

Plaintiff argues that it was unfair to require plaintiff's attendance at the hearing and then to use his attendance to discredit his testimony, that it was improper to interpret plaintiff's long walks, which were a coping mechanism, as an indication he was capable of being in public, and that it was improper to assume that plaintiff's ability to do laundry in a communal laundry room meant he could successfully function in a public setting (Pl.'s Mem. at 4-6).

"An ALJ 'is not required to accept the claimant's subjective complaints without question; he may exercise discretion in weighing the credibility of the claimant's testimony in light of other evidence in the record.'" Burnette v. Colvin, 564 F. App'x 605, 609 (2d Cir. 2014) (summary order), quoting Genier v. Astrue, supra, 606 F.3d at 49; Campbell v. Astrue, 465 F. App'x 4, 7 (2d Cir. 2012) (summary order) ("[W]e have long held that '[i]t is the function of the [Commissioner], not ourselves, . . . to appraise the credibility of witnesses, including the claimant.'" (first alteration added)), quoting Carroll v. Sec'y of Health & Human Servs., 705 F.2d 638, 642 (2d Cir. 1983).

The ALJ found plaintiff to be "credible, but not to the extent alleged [sic]" (Tr. 21). I assume the ALJ was attempting to say that he found claimant not entirely credible. The ALJ discounted plaintiff's testimony regarding his anxiety induced by

being around people because plaintiff was able to use public transportation by himself, went for long walks alone, did laundry in a communal laundry room, had had romantic relationships, could perform his own activities of daily living and left his last job in 2006 only because it was temporary (Tr. 21).

The ALJ's analysis of these factors was not inappropriate. The ALJ was required to engage in a credibility analysis, and that is what he did. Contrary to plaintiff's contention, the ALJ did not discredit plaintiff's testimony concerning the severity of his symptoms simply because he attended the hearing; rather, the record contains several other reports of plaintiff's ability to use public transportation successfully.¹⁴ More importantly, the fact that the record might support a different finding with respect to plaintiff's credibility, which is essentially plaintiff's argument, is not grounds for remand. McIntyre v. Colvin, 758 F.3d 146, 149 (2d Cir. 2014) ("If evidence is susceptible to more than one rational interpretation, the Commis-

¹⁴Plaintiff cites Hyer v. Colvin, 3:12-CV-0054 (GTS) (DEP), 2013 WL 1193444 at *2 (N.D.N.Y. Mar. 22, 2013), in support of his contention that a claimant's attendance at his disability hearing cannot be held against him (Pl.'s Mem. at 4). This case is inapposite. The court remanded that matter because, among other issues, the ALJ failed to assess the plaintiff's credibility, giving only a conclusory statement. Hyer v. Colvin, supra, 2013 WL 1193444 at *9.

sioner's conclusion must be upheld."), citing Rutherford v. Schweiker, 685 F.2d 60, 62 (2d Cir. 1982).

3. Medical
Source Opinions

Plaintiff also argues that remand is required because the ALJ erred in his assessment of the opinions from (a) plaintiff's treating nurse practitioner, (b) plaintiff's treating physician and (c) the consulting physicians (Pl.'s Mem. at 6-9).

a. Treating Nurse
Practitioner

Plaintiff argues that the ALJ was bound to accord NP Jung's opinion controlling weight under the treating physician rule because she was a treating source and her assessment was supported by treatment notes (Pl.'s Mem. at 9-10).

NP Jung was a nurse practitioner, not a physician, and, thus, is not an "acceptable medical source" whose opinion was entitled to controlling weight under the regulations. 20 C.F.R. § 416.913(a); see also Genier v. Astrue, 298 F. App'x 105, 108 (2d Cir. 2008) (summary order) ("[N]urse practitioners and physicians' assistants are defined as 'other sources' whose opinions may be considered with respect to the severity of the claimant's impairment and ability to work, but need not be

assigned controlling weight."), citing 20 C.F.R. § 416.913(d)(1). Because NP Jung was properly classified as an "other source," the ALJ was not required to give her opinion controlling weight after applying the factors listed in 20 C.F.R. § 416.927; see SSR 06-3p, 2006 WL 2329939 at *4-*5 (Aug. 9, 2006) ("Although the factors in 20 CFR 404.1527(d) and 416.927(d) explicitly apply only to the evaluation of medical opinions from 'acceptable medical sources,' these same factors can be applied to opinion evidence from 'other sources.'").¹⁵

The ALJ, did not, however, apply the required factors.

Regarding NP Jung's opinion, he wrote:

Ms. Jung's opinions regarding the claimant's mental functional limitations at Exhibit 3F are given little weight because it is [sic] inconsistent with claimant[']s activities of daily living detailed above and inconsistent with and not supported by the medical records as described above. For example, the claimant's mental status examinations since 2004 have been essentially normal. In addition, Ms. Jung is not a medically acceptable source (20 C.F.R. § 416.913(d)[])

¹⁵The factors are: (1) whether the source examined the individual, (2) the length and frequency of the treatment relationship, (3) whether the source presents evidence to support an opinion, (4) how consistent the opinion is with the other evidence of record, (5) the specialization of the source and (6) any other relevant factors. 20 C.F.R. § 416.927(c). Effective March 26, 2012, Section 416.927(d) was re-codified as 416.927(c), but with no substantive changes. See How We Collect & Consider Evidence of Disability, 77 Fed. Reg. 10,651, 10,657 (Feb. 23, 2012) (codified at 20 C.F.R. pts. 404, 416).

(Tr. 21). The ALJ also noted that "Ms. Jung wrote on June 6, 2011 that the claimant had a history of suicide attempts and one homicide attempt, but save for a depressed mood, his mental status examination was normal (Exhibit 3F)" (Tr. 20).¹⁶

The only factor the ALJ addressed here was the consistency of NP Jung's opinion with the rest of the record; however, that analysis is internally inconsistent. The ALJ stated that NP Jung found plaintiff to have a normal mental status, but he then discounted NP Jung's opinion because he found it to be inconsistent with other evidence of record that showed plaintiff's mental status to be essentially normal since 2004.¹⁷ The ALJ also claimed that Jung's opinion is inconsistent with plaintiff's ability to perform the activities of daily living; however, it is not apparent from Jung's report how that is so. In fact, Jung concluded that plaintiff had no limitations on his ability to perform the activities of daily living. Furthermore, the ALJ inappropriately discounted Jung's opinion on the basis of her

¹⁶NP Jung's report at Exhibit 3F is undated (see Tr. 254).

¹⁷While the ALJ characterizes plaintiff's mental status as "normal," Dr. Rosendahl, plaintiff's treating physician, recommended in March 2012 that plaintiff remain in close psychiatric observation and treatment to target depression, mood lability, impulsivity and rage episodes (Tr. 326), and Dr. Hoffman, the consulting psychologist, also recommended, in June 2011, that plaintiff continue to receive "intensive outpatient mental health treatment" (Tr. 261).

status as an "other source." Losquadro v. Astrue, 11 Civ. 1798 (JFB), 2012 WL 4342069 at *15 (E.D.N.Y. Sept. 21, 2012) ("[T]he ALJ cannot disregard or give little weight to a medical opinion solely because it is categorized as an 'other source.'").

The ALJ's lack of analysis with respect to Jung's opinion is particularly problematic here because Jung had a lengthy treatment relationship with the plaintiff, as evidenced by her treatment notes in the record. See Carroll v. Colvin, 13 Civ. 456S, 2014 WL 2945797 at *3 (W.D.N.Y. June 30, 2014) ("Sources not technically deemed 'acceptable medical sources,' . . . are important in the medical evaluation because they have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists." (internal quotation marks omitted)). Remand is, therefore, also appropriate so the ALJ can provide an appropriate analysis of Jung's opinion.

b. Treating Physician

Plaintiff next argues that the ALJ erred by failing to provide good reasons for rejecting Dr. Rosendahl's opinion and failing to state what weight he accorded Dr. Rosendahl's opinion (Pl.'s Mem. at 8-9). There are only treatment notes from Dr. Rosendahl in the record -- there is no opinion as to plaintiff's

ability to work and consequently no discussion of it in the record. Because there is no opinion from Dr. Rosendahl in the record, plaintiff's argument lacks a factual predicate and must be rejected.

c. Consulting Physicians

Plaintiff argues that the ALJ violated the treating physician rule by affording the consultative opinions greater weight than plaintiff's treating sources (Pl.'s Mem. at 10).

It is not per se legal error for an ALJ to give greater weight to a consulting opinion than a treating opinion. See Rosier v. Colvin, No. 13-4490-CV, 2014 WL 5032325 at *2 (2d Cir. Oct. 9, 2014) (summary order), citing Halloran v. Barnhart, 362 F.3d 28, 32 (2d Cir. 2004) ("Although the treating physician rule generally requires deference to the medical opinion of a claimant's treating physician, the opinion of the treating physician is not afforded controlling weight where . . . [it is] not consistent with other substantial evidence in the record . . .").

Nevertheless, in absence of a treating physician's opinion, the regulations require both examining and nonexamining consultants' opinions to be analyzed using the same factors used to assess a treating physician's opinion. "Regardless of its source, [the SSA] will evaluate every medical opinion [it]

receive[s]. Unless [the SSA] give[s] a treating source's opinion controlling weight under paragraph (c)(2) of this section, [it will] consider all of [several specific] factors in deciding the weight [it] give[s] to any medical opinion." 20 C.F.R. § 416.927(c); see Peryea v. Comm'r of Soc. Sec., 5:13-CV-0173 (GTS) (TWD), 2014 WL 4105296 at *8 (N.D.N.Y. Aug. 20, 2014) (adopting Report & Recommendation) ("[Consulting] opinions must be evaluated according to the criteria governing all medical opinions."); Finney ex rel. B.R. v. Colvin, 13-CV-00543-A, 2014 WL 3866452 at *7 (W.D.N.Y. Aug. 6, 2014) (Report & Recommendation) (listing the "six factors used in evaluating [opinions of] consultative psychologists"), citing 20 C.F.R. § 416.927(d). This the ALJ did not do.

Here, there was no opinion at all from plaintiff's treating physician, and the ALJ gave "little weight" to plaintiff's only treating source, NP Jung. When analyzing the consulting physician opinions, from Dr. Harding and Dr. Hoffman, the ALJ wrote: "I give great weight to the opinions set forth by the psychological consultative examiner, and the physician opinions in the Psychiatric Review Technique and Mental [R]esidual [F]unctional [C]apacity [A]ssessment since those assessments [conclude] that the claimant can perform unskilled work [sic], despite an array of moderate mental limitations" (Tr. 21). The foregoing

sentence essentially says, "I credit the psychological consulting physician and certain other physician opinions because they conclude plaintiff is not disabled." This reasoning is patently deficient and requires remand for compliance with the analysis required by the regulations.

d. Consulting Physician
Opinion as Evidence

Plaintiff also challenges the ALJ's use of the opinion from the nonexamining consulting physician, Dr. Harding, as evidence. Specifically, plaintiff argues that, "Since T. Harding is the state agency reviewer, he/she is summarizing evidence in the decision-making process. This is not evidence, but rather, a part of the decision-making process itself" (Plaintiff's Reply Memorandum of Law, dated July 11, 2014 (Docket Item 16) at 1-2). The regulations specifically state that "administrative law judges must consider findings and other opinions of State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists as opinion evidence." 20 C.F.R. § 416.927(e)(2)(i). Consequently, plaintiff's argument in this regard fails.

4. Reliance on Vocational
Expert Testimony

Lastly, plaintiff argues that the ALJ erred by relying on the vocational expert's testimony (Pl.'s Mem. at 11-12).

The ALJ posed two questions to the vocational expert.¹⁸ In each question, the ALJ described hypothetical restrictions and asked the vocational expert whether there was work in the national economy that an individual with those restrictions could perform. The vocational expert testified that work existed for an individual with the first set of restrictions described by the ALJ, but that work did not exist for an individual with the second set of restrictions. In his decision, the ALJ relied on the vocational expert's response to the first question in determining that the plaintiff was not disabled, but he did not mention the second question.

Plaintiff argues that the ALJ's reliance on the vocational expert's testimony was improper because the plaintiff's limitations were not adequately described by the hypothetical in the ALJ's first question, and the ALJ was required to explain why he did not rely on the vocational expert's testimony in response to the ALJ's second question (Pl.'s Mem. at 11-12).

¹⁸The questions to the vocational expert are summarized at pages 15-16 above.

"An ALJ may rely on a vocational expert's testimony regarding a hypothetical as long as the facts of the hypothetical are based on substantial evidence and accurately reflect the limitations and capabilities of the claimant involved."

Calabrese v. Astrue, 358 F. App'x 274, 276 (2d Cir. 2009) (summary order) (citations omitted), citing Dumas v. Schweiker, 712 F.2d 1545, 1553-54 (2d Cir. 1983) and Aubeuf v. Schweiker, 649 F.2d 107, 114 (2d Cir. 1981).

Here, the ALJ's RFC determination was identical to the first hypothetical posed to the vocational expert¹⁹; consequently, if that RFC was supported by substantial evidence, it was proper for the ALJ to rely on the vocational expert's testimony. However, because the ALJ must reassess the medical sources and reassess plaintiff's RFC, the ALJ may need to obtain further testimony from a vocational expert in the event that his new finding of RFC differs from the previous one.

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that the Commissioner's motion for judgment on the pleadings be denied and plaintiff's cross-motion for judgment

¹⁹Plaintiff argues that the ALJ never made an RFC determination (Pl.'s Mem. at 11). That is not true (see Tr. 19).

on the pleadings be granted to the extent of remand. I recommend that the case be remanded to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this report and recommendation.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Paul G. Gardephe, United States District Judge, 40 Foley Square, Room 2204, and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Gardephe. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair

Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983) (per curiam).

Dated: New York, New York
December 17, 2014

Respectfully submitted,


HENRY PIPMAN
United States Magistrate Judge

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